No. 92-1445

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA
Plaintiff,

LUMMI INDIAN TRIBE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petition for Writ of Certiorari should be denied. However, if granted, this case presents an additional question: Does the decision in Montana v. United States, 450 U.S. 544 (1981) and the Equal Footing Doctrine presumption against inclusion of navigable waters in a pre-statehood reservation mean that Bellingham Bay is not included within the boundaries of the Lummi Indian Reservation?

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BRIEF OF RESPONDENT, STATE OF WASHINGTON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B14) is reported at 969 F.2d 752. The opinion of the district court with findings of fact and conclusions of law (Pet. App. A1-A12) is not reported.

II. NOTICE OF MISSTATEMENT REQUIRED BY RULE 15.1

Rule 15.1 requires the respondent to address any "perceived misstatements of fact or law set forth in a petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Here, the petition contains significant misstatements of historic facts. (See Statement of the Case at 7-9.)

Petitioner's question asks whether the court of appeals erred in "failing to consider the historical context and the clear Indian intent and understanding of a Treaty promise when interpreting" the 1873 Executive Order at issue in this case. The district court, however, rejected many of Lummi's factual assertions and made findings of fact showing that the historic context

supports the State of Washington's interpretation.

The factual misstatements show that the Question stated by Petitioner would not be properly before the Court if certiorari were granted. See part IV. B. below. Essentially, the Question presented by Petitioner invites this Court to retry this case and ignore findings of the district court.

III. STATEMENT OF THE CASE

This case arose after Petitioner excluded non-Indians from fishing in certain waters of Bellingham Bay. To determine whether the Tribe owed non-Indians an equitable adjustment for imbalance of fish harvests, the trial court first determined whether the area of Bellingham Bay was within the Lummi Indian Reservation. See generally United States v. Washington, 774 F.2d

1470 (9th Cir. 1985) (describing equitable adjustment).

The Lummi Reservation was created pursuant to the Treaty of Point Elliott, executed January 22, 1855. Article 2 of the Treaty set aside

> "the island called Chah-choo-sen, situated in the Lummi River at the point of separation at the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia."

Pet. App. A2-A3 (Finding No. 2).

An 1859 map of all Indian reservations in the territory showed the Lummi Reservation as the island, without including any portion of the Bay. Pet. App. A3 (Finding No. 4). Over the years, numerous other maps were made by the United States and no map ever depicted the reservation boundary as a straight line across the Bay. Pet. App. A6, A9 (Finding No. 12, Conclusion No.

2). Other evidence in the record showed a United States and Indian understanding that the boundary was the shoreline.

Indian agent Michael Simmons, who had attended the treaty council, described the boundary in 1859 as the shoreline, not a straight line across the Bay. Pet. App. A3-A4 (Finding No. 5). To avoid the costs of survey of the river boundary on the north[1] side of the island, Michael Simmons proposed changing the north boundary to follow township lines (which were cheaper to survey). Pet. App. A3-A5 (Finding Nos. 5 and 7). In 1873, the Commissioner of Indian Affairs questioned the legality of Simmons' changes to the north

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[1] The boundary at issue is on the southeast side of the island.

boundary. Ibid. To eliminate clouds on title to lands included and excluded per Simmons' 1859 proposal, President Ulysses S. Grant issued an Executive Order that formally reserved the "squared off" north boundary. Pet. App. A10 (Conclusion No. 5). There was no evidence of an Indian impetus for the 1873 Order. Ibid.

The 1873 Executive Order expressly described the area of the 1859 survey changes to the north boundary, and then followed the shoreline of the island with the following language:

> . . . thence west along such township line to low-water mark on the shore of the Gulf of Georgia thence Southerly and easterly along the said shore with the meanders thereof across the western mouth of Lummi river and around Point Francis thence northeasterly to the place of beginning [the eastern mouth of Lummi River].

When presented to a surveyor, the 1873 Order was susceptible to only one interpretation -- the boundary followed the shoreline on the western boundary, around Point Francis, and along the disputed eastern boundary. Pet. App. A7 (Finding No. 14). In light of the fact that "Point Francis" referred to an area to go "around," Pet. App. A13 (Finding No. 13), the 1873 Order could not be interpreted as a straight line bearing "northeast" from Point Francis. Pet. App. A9 (Conclusion No. 2).

The historic context described in the Lummi Petition for Writ of Certiorari was not found by the district court. The Lummi allegations about historic facts are inaccurate in the following details:

1. Lummi asserts that in 1854 Governor Isaac Stevens represented that

the Lummi reservation boundary would be a "straight" line from the area of Point Francis to Treaty Rock. Although Lummi made this contention in the pretrial order, the district court did not make such a finding. The trial court entered findings which reject Lummi evidence on this subject. See Pet. App. A10-A11 ("[T]he interest of tribal members in exclusive fishing rights in the contested waters must be considered in evaluating their testimony.") Moreover, other findings of historic fact conflict with Lummi's assertion that Stevens represented a straight line boundary. Pet. App. A2-A7 (Findings 2, 4, 5, 6, 7, 13, and 14).

2. Contrary to statements in the Lummi argument, the district court did not find that "for 138 years the Lummi treated the eastern boundary as a

straight line between Point Francis and Treaty Rock." The record includes substantial evidence that Lummi tribal members understood the reservation boundary to be the shoreline of the island. ER 79-88; SER 44; SER 76-78. Other findings conflict with Lummi's asserted understanding. Finding No. 5 and 6 (Pet. App. A3-A4). [2]

3. Lummi arguments imply that the case of United States v. Romaine, 255 F. 253 (9th Cir. 1919) found that Governor Stevens promised a "straight line" reservation boundary. There was

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[2] Findings Nos. 5 and 6 concern Michael Simmons and C.C. Finkbonner. Simmons negotiated with the Lummi and Finkbonner spoke the Lummi language. Despite their contact with the tribe at treaty time, these two show that the Indians believed the reservation boundary to be the shoreline of the island. SER 44; ER 79-88.

no such finding in Romaine at either the trial court or ninth circuit court of appeals. Instead, the Romaine opinion addresses uncontested Indian testimony about the original location of the eastern mouth of the Lummi river (which is the "place of beginning" for the 1873 Order). 969 F.2d at 757. Romaine did not involve a legal or factual dispute about a straight line or shoreline boundary between the Point Francis area and the eastern mouth of the Lummi River.

IV. REASONS WHY THE PETITION SHOULD BE DENIED

The Question presented by the Lummi Petition is unique and limited to the particular language of the Treaty and 1873 Executive Order. The particular language and historic context of this case does not implicate the

jurisprudence of the Court and therefore does not merit review. Moreover, to reach the Lummi issues, this Court would have to retry the case.

1. **The Opinion Below Does Not Conflict With Rules of Interpretation for Indian Treaties or Executive Orders.**

The ninth circuit court of appeals correctly decided that neither the Treaty nor the Executive Order could be interpreted as reserving a straight line boundary across Bellingham Bay. The court of appeals decision is not new precedent for interpretation of Executive Orders because the law has never allowed courts to disregard plain language. See Oregon Dep't. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985).

Review of the court of appeals opinion presents only the narrow issue

of whether the particular 1873 Executive Order language unambiguously precludes the straight line boundary claimed by Lummi. Without an ambiguity susceptible to a straight line interpretation, the opinion below is not in conflict with canons of construction for Indian law. No rule of interpretation requires a court to accept any interpretation by a modern tribe, when a fair reading of the Executive Order and Treaty reveals no ambiguity. Klamath, 473 U.S. at 774.

Since there is no ambiguity in the language in question, the court of appeals did not depart from the usual course of judicial proceedings with regard to canons of construction for Indian treaties or executive orders. Furthermore, whether or not the particular language was ambiguous does not merit certiorari.

2. **This Case Does Not Present the Issues Described in the Lummi Petition.**

To reach the historical context and Lummi allegations of Indian understanding, the Court would have to go beyond the unambiguous language of this Executive Order and examine the district court's findings of historic fact. See Pet. App. A1-A7.

Lummi, however, ignores the findings of historical fact made by the trial court and reargues its evidence of historic facts. As described in the Statement of the Case at 7-9, the trial court findings do not show a "clear Indian intent and understanding" nor a "historical context" supporting a straight line boundary.

This Court has previously ruled that appellate courts should not insert new findings of fact that conflict with

a trial court's findings. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). Therefore, even if the Court looks behind the language of the 1873 Executive Order, it will not find the case described by Lummi. Instead, the question would be whether the trial court should be affirmed based on its numerous findings of historical fact confirming that the shoreline is the boundary of the island reservation.

Therefore, the Court should deny the Petition for Writ of Certiorari because this case does not present the issue described by Lummi. The court of appeals opinion does not conflict with "clear Indian understanding" because Lummi never proved that such clear

Indian understanding of a straight line existed.[3]

Similarly, the trial court's findings of fact contradict Lummi's allegation that in 1854 Governor Isaac Stevens represented that the reservation would have a straight line boundary

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[3] Lummi's reliance on excerpts from the appellate record in United States v. Romaine vastly overstates the relevance and credibility of the evidence from that case. The Romaine documents were inconsistent, vague, and uncredible evidence of Lummi's interpretation that the trial court did not accept. See Conclusion No. 6 (Pet. App. A10-A11).

The evidence was not a transcript of Indian testimony; Lummi relies on a lawyer's summary of a translator's description of witnesses such as "George Tsilano." It was not clear whether Tsilano testified about a "straight" line from Point Francis to mouth of the river near Treaty Rock. The trial court also heard evidence that Romaine witnesses, including Tsilano, were completely inaccurate in their contemporaneous descriptions of the other reservation boundaries.

crossing Bellingham Bay. See Statement of the Case at 7-8, above.

Nor is there any finding that the 1873 Executive Order language regarding the reservation's eastern shoreline was based in any way on the treaty negotiation of 19 years before. Pet. App. A10 (Conclusion No. 5). Therefore, the Lummi evidence about the 1855 Treaty negotiations had very little relevance to interpretation of the unilateral 1873 Executive Order.[4]

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[4] Indian understanding is important to interpretation of negotiated agreements or treaties, but not unilateral actions. Cohen's Handbook of Federal Indian Law, 224 n.60 (1982) ("The rule [about Indian understanding] would logically apply to agreements, which like treaties, are bilateral agreements, but would not seem to apply to the executive orders and statutes, neither of which directly involved negotiations with the tribes."); (Footnote continues on next page)

The particular findings of the district court in this case do not merit certiorari.

3. **The Court of Appeals' Decision Does Not Conflict With *Alaska Pacific Fisheries*.**

Lummi's reliance on the case of Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) is misplaced. In Alaska Pacific Fisheries, this Court interpreted an Act of Congress reserving the "body of lands known as Annette Islands [plural]" for use by the Metlakatla Indians. The issue was whether Congress had reserved the waters

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(Footnote continued from previous page)

Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1400 n. 14 (Ct. Cl. 1973) cert. denied 416 U.S. 961 (1973).

between the islands, or whether the waters were available for fishing by the Alaska Pacific Fisheries Company. The words "body of lands known as Annette Islands" could mean either land, or both land and water.

In contrast, the Treaty with Lummi Indians reserved the "following tracts of land, viz: . . . the island [singular] known as Chah-choo-sen." When there is one island, there is no ambiguity about intervening waters. The words "island known as Chah-choo-sen" are not susceptible to interpretation as a straight line boundary crossing Bellingham Bay.

The court of appeals correctly concluded that the words of the Executive Order with a reference to "island" already set aside by treaty are not susceptible to the ambiguity argued

by Lummi. 969 F.2d at 756. There is no conflict with the unique case of Alaska Pacific Fisheries.

4. **The Court of Appeals' Opinion may be Affirmed Based on the Equal Footing Doctrine.**

In the seminal decision of Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), this Court explained that the several states are presumed to have title to the beds of navigable waters as an attribute of their sovereignty. The "Equal Footing Doctrine" presumes against the conveyance of navigable waters by the prior sovereign. Grants of lands along and under navigable waters are to be construed strictly "and it will not be presumed that (the prior sovereign) intended to part with any portion of the public domain, unless clear and especial words are used to

denote it." Id. at 411 (emphasis added).

This Court has continually upheld the strong presumption against pre-statehood conveyance of navigable waters, even when interpreting pre-statehood reservations for Indian purposes. See, United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Montana v. United States, 450 U.S. 544, 552 (1981); cf. Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) (pre-statehood reservation by United States).

Neither the 1873 Executive Order nor the 1855 Treaty contains any clear and especial words reserving the disputed part of Bellingham Bay for exclusive control and ownership by the Lummi Tribe. Cf. United States v. Aam, 887 F.2d 190 (9th Cir. 1989) (where the

same treaty article did not reserve tidelands adjacent to Suquamish reservation). If certiorari were granted, this case would present the question of whether the 1873 Executive order and 1855 Treaty by implication defeated the equal footing title of the future State of Washington to a substantial portion of Bellingham Bay.

As appellee, Washington is free to defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the district court or court of appeals. E.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Washington argued to each court below that this case could be resolved based on the Equal Footing Doctrine. If certiorari were granted, the Equal Footing Doctrine would be an

alternative basis for affirmance of the district court and court of appeals.

V. CONCLUSION

Canons of construction do not require courts to "ignore plain language that, viewed in historical context and given fair appraisal . . . clearly runs counter to a tribe's later claims." Klamath, 473 U.S. at 774. The court of appeals did not err in its interpretation of the 1873 Executive Order.

When the trial court's findings of historic fact are examined, this case does not present the question described in the Lummi Petition. The Lummi Petition errs by ignoring the prior trial in this case and petitioning for certiorari based on a reargument of the evidence.

The Petition for Writ of Certiorari should be denied for the above reasons.

Respectfully submitted,

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